

FACTUAL HISTORY

On January 15, 2002 appellant, then a 37-year-old mail handler, filed a traumatic injury claim alleging that he experienced a pop and sharp pain in his left knee while working in the trayline on January 9, 2002. He described his injury as a torn cartilage in the left knee. Appellant stopped work on January 9, 2002. The employing establishment controverted the claim.¹

In a statement dated May 1, 2002, appellant described the circumstances surrounding his injury.

By decision dated May 28, 2002, the Office denied appellant's claim, finding that the factual evidence failed to demonstrate that the claimed injury occurred as alleged.

On September 4, 2002 appellant requested reconsideration and submitted additional evidence. By decision dated December 6, 2002, the Office denied modification of the May 28, 2002 decision.

On October 23, 2003 appellant requested reconsideration, noted the claim number and submitted additional factual and medical evidence. The Office received the request on October 27, 2003. The request contained the word "Reconsideration" and advised that appellant had submitted a statement regarding the details of his injury and that he was submitting a medical report from his physician regarding a previous injury and surgery and how the work injury loosened appellant's hardware. Appellant indicated that the claim should be approved and benefits awarded in light of the additional information. Accompanying the request was an October 9, 2003 statement by appellant addressing his actions after he sustained the alleged injury.

By letter dated February 12, 2004, the Office responded to an inquiry from appellant and noted that the data base did not contain a request for reconsideration. The Office indicated that a form letter was discovered, wherein appellant had submitted a statement and medical reports. The Office explained that this was not considered a proper reconsideration request.

In a file memorandum dated April 7, 2004, the Office again noted that the letter from appellant was a form letter and not a proper request for reconsideration. The Office indicated that there was no new request for reconsideration to be acted upon.

On May 13, 2004 appellant provided a copy of a second request for reconsideration dated February 26, 2004 and a copy of a stamped receipt dated March 3, 2004.

¹ In a separate statement, Janet Hernandez, a supervisor, alleged that appellant was fine until he returned from his break, and was in pain and limping. She explained that when he was questioned, he indicated that his knee was hurting, she noted that on appellant's request for notification of absence, he indicated that he had surgery on the knee, 18 years earlier due to an automobile accident and the pain was related to the surgery.

In a decision dated June 14, 2004, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”³

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).⁴ This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁶

ANALYSIS

The Office issued a merit decision on December 26, 2002, which denied appellant's claim on the basis that the factual evidence was insufficient to establish that he sustained an injury as alleged.

Appellant subsequently submitted a October 23, 2003 request for reconsideration. The Office received this request on October 27, 2004. The Office did not respond to this request

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8128(a).

⁴ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ 20 C.F.R. § 10.607(b).

until February 12, 2004, when an inquiry was made into the status of his request. The Office subsequently explained that the October 23, 2003 request was not a “proper” request and explained that the first request made by appellant’s representative on September 4, 2002 was proper, but the October 23, 2003 request was not because it appeared to be a form letter. After being informed that the October 23, 2003 request was insufficient, appellant again filed a request for reconsideration dated February 26, 2004. This request was denied as untimely.

The Board notes, however, that the October 23, 2003 request was a request for reconsideration and was timely filed. Appellant labeled the request as “reconsideration,” provided the claim number, requested that the claim be approved and submitted a new factual statement. Appellant provided additional details regarding the claim and also submitted new medical reports in support of his claim. He concluded his request by indicating that based on the additional information his claim should be approved. The Board finds that this was a timely request for reconsideration.⁷ Thus, the Office improperly denied his reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since the Office erroneously reviewed the evidence submitted in support of appellant’s reconsideration request under the clear evidence of error standard, the Board will remand the case to the Office for review of this evidence under the proper standard of review for a timely reconsideration request.⁸

CONCLUSION

The Board finds that the October 23, 2004 reconsideration request was timely filed.

⁷ Cf. *Gladys Mercado*, 52 ECAB 255, 256-57 (2001) (no special form is required for a reconsideration request).

⁸ See *Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Issued: January 6, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member